

**February 7, 2002**

**Barbara A. Schermerhorn**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE CECIL OWEN MORGAN, JR.,  
also known as C.J. Morgan; and  
JULIE ANN MORGAN, formerly  
known as Julie Disher,

Debtors.

BAP No. WO-01-070

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WASHITA STATE BANK,

Appellant,

v.

CECIL OWEN MORGAN, JR. and  
JULIE ANN MORGAN,

Appellees.

Bankr. No. 00-18351  
Chapter 7

ORDER AND JUDGMENT\*

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Appeal from the United States Bankruptcy Court  
for the Western District of Oklahoma

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Before McFEELEY, Chief Judge, PUSATERI, and BOULDEN, Bankruptcy  
Judges.

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PUSATERI, Bankruptcy Judge.

Neither of the parties requested oral argument, and after examining the  
briefs and appellate record, the Court has determined unanimously that oral  
argument would not materially assist in the determination of this appeal. *See* Fed.  
R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered

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\* This order and judgment has no precedential value and may not be cited,  
except for the purposes of establishing the doctrines of law of the case, res  
judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

submitted without oral argument.

Washita State Bank (“WSB”) appeals the bankruptcy court’s order avoiding its nonpurchase-money security interest in certain items that were alleged to be exempt under Okla. Stat. Ann. tit. 31, § 1(A)(6) & (C) (West 2001), as tools of a trade. For the reasons stated below, we reverse and remand the case for a ruling on WSB’s objection to the debtors’ claim that the items are exempt.

### **Background**

The debtors filed a chapter 7 bankruptcy petition in October 2000, but filed their first schedules about six weeks later. They indicated on Schedule B, “Personal Property,” that they had no “machinery, fixtures, equipment, and supplies,” and did not list any such property on Schedule C, “Property Claimed as Exempt,” as exempt tools of a trade.

About three months after filing their schedules, on March 2, 2001, the debtors filed a motion to avoid WSB’s nonpossessory, nonpurchase-money security interest in personal property that they identified only as “Tools of Trade \$5,000.00.” WSB responded, complaining that the debtors had not listed any tools of trade in their schedules and that their motion failed to identify or describe any tools of trade or specify a value for any particular tool. WSB attached a list of the tools and equipment in which it claimed the debtors had given it a security interest. This matter was set for hearing on May 1.

On April 24, the debtors filed amended Schedules B and C to list fifty-one items or groups of items as “machinery, fixtures, and supplies,” giving specific dollar values and relatively specific descriptions for each item or group, and claiming them all as exempt. The dollar values given totaled \$3,574.09. On May 23, WSB objected to the exemption claims. It alleged that the debtors refused to disclose the present location of the property to the trustee or to WSB, and that the property was worth more than the values listed in the amended schedules. WSB

asserted that it had the right to inspect and appraise the property in order to support its objection.

In the meantime, however, at the hearing on May 1, the bankruptcy court granted the debtors' motion to avoid WSB's lien.<sup>1</sup> A written order was entered on May 30, declaring that WSB's lien on the "exempt property" (emphasis in original) listed on amended Schedule B was avoided. On June 7, WSB filed a motion to alter or amend, complaining that it had timely objected to the debtors' amended exemptions and that no exemption of tools of a trade had been allowed to the debtors when the order avoiding WSB's lien was entered. The debtors filed a response to WSB's objection to their exemptions, contending, among other things, that WSB no longer had an interest in the tools of trade because its lien had been avoided. The debtors also filed a response opposing WSB's motion to alter or amend the order avoiding its lien.

WSB's motion to alter or amend was set for hearing on August 21. The debtors' counsel appeared, but WSB did not. The court orally denied the motion for failure to prosecute, and a written order to that effect was entered on September 5. WSB filed a notice of appeal on August 30, appealing the order avoiding its lien.

## **Discussion**

Section 522(f) of the Bankruptcy Code provides in pertinent part:

(1) . . . [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

. . .

(B) a nonpossessory, nonpurchase-money security interest in any—

. . .

(ii) implements, professional books, or

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<sup>1</sup> The record on appeal does not include a transcript of this hearing.

tools, of the trade of the debtor or the trade  
of a dependent of the debtor . . . .

11 U.S.C. § 522(f)(1)(B)(ii). In *Owen v. Owen*, 500 U.S. 305, 308-14 (1991), the Supreme Court explained that the phrase “an exemption to which the debtor would have been entitled” refers to an exemption to which the debtor would have been entitled but for the lien at issue. Consequently, even if the law creating the exemption defines the exemption in such a way that the lien would prevent the property from being exempt, the lien may still be avoided under this provision. In this case, WSB does not claim that its lien precludes the debtors from exempting the tools of trade, but that the value of the tools exceeds, or at least may exceed, the \$5,000 value that may be exempted under Oklahoma law. *See Okla. Stat. Ann. tit. 31, § 1(C)*.

The debtors suggest, citing no supporting authority, that a court may avoid a lien under § 522(f)(1)(B)(ii) without determining whether the property securing the lien actually qualifies for the applicable exemption. *Owen* made clear that the hypothetical circumstance to which this provision applies is the one that would exist if the lien did not exist. So a lien may be avoided under the statute if the property either qualifies as exempt or would qualify as exempt but for the lien. The debtors’ suggestion, though, reads the “would have been entitled” language out of the statute and allows a debtor to avoid a lien even if the debtor would not be entitled to exempt the property if the lien did not exist. We find the suggestion most unconvincing.

Section 522(l) provides in pertinent part: “The debtor shall file a list of property that the debtor claims as exempt . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt.” 11 U.S.C. § 522(l). This provision enables a debtor to effectively exempt property even though applicable law supplies no good-faith basis for the exemption claim. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 642-45 (1992). Consequently, creditors who wish to

contest the validity of the debtors' exemption claims must object to them within the time limits set by Federal Rule of Bankruptcy Procedure 4003(b). At the time this case was filed, the first sentence of subsection (b) of the Rule provided: "The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court." Fed. R. Bankr. P. 4003(b) (amended 2000). That sentence was amended effective December 1, 2000, (shortly after this case was filed) to provide: "A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Fed. R. Bankr. P. 4003(b). Under either version of the Rule, WSB had 30 days to object after the debtors filed their amended Schedules B and C to reveal their ownership of the items that are now in dispute and claim them as exempt tools of trade. The debtors filed those amendments on April 24, so WSB had until May 24 to object to the newly-claimed exemptions, and its May 23 objection was timely.

When the bankruptcy court held the hearing on the debtors' motion to avoid WSB's lien on May 1, the time to object to the tools of trade exemption claim had not run. Nevertheless, as shown by the written order entered on May 30, the court declared that the property was exempt and that WSB's lien was avoided. Because the time to object to the debtors' amended exemption claim had not yet run on May 1, the court could not properly decide then whether the property was exempt, and committed reversible error by doing so.

The debtors suggest that WSB has waived the error in the bankruptcy court's ruling by failing to prosecute its motion to alter or amend the order

avoiding its lien. They cite no authority for this proposition. Federal Rule of Bankruptcy Procedure 9023 makes Civil Rule 59 applicable to cases under the Bankruptcy Code (except for reconsideration of claims under Rule 3008). In discussing Civil Rule 59, a leading authority on federal civil procedure declares that: “The settled rule in federal courts, contrary to that in many states, is that a party may assert on appeal any question that has been properly raised in the trial court. Parties are not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal.” 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2818, at 186 (1995). We believe this should also be the rule for motions to alter or amend. So long as a party has properly presented an issue to the trial court before that court rendered its judgment, there is no reason to require the party to ask again for a ruling in its favor in order to obtain appellate review of the issue. Furthermore, because a motion to alter or amend is not required to preserve the right to appeal a ruling, a party should not be deemed to waive that right by filing but not pursuing a permissive motion to alter or amend. If we were to require a party, at the risk of foregoing the right to appeal the trial court’s decision, to seek relief under Rule 59(e) or, once begun, to continue to pursue such relief to the bitter end, we would simply be laying a procedural trap for the unwary that would serve no useful purpose. We decline to do so.

### **Conclusion**

We conclude that the bankruptcy court erred by declaring that the debtors’ claimed tools of trade were exempt and granting their motion to avoid WSB’s lien before the time to object to the debtors’ amended schedules had expired. WSB timely objected to the debtors’ tools of trade exemption claim, so the case is remanded for resolution of that dispute. WSB’s lien may be avoided only to the extent the tools of trade exemption is properly allowed.